

An Embodied Bisexual Perspective

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INTRODUCTION

In his book, *Sex and Reason*,¹ Judge Richard Posner argues that law and society should treat sexuality as a “morally indifferent subject.”² Society should regard sexual preferences³ as having no greater moral significance than preferences for food. Although many gay rights proponents disagree with Posner’s specific application of this principle,⁴ no one seems to disagree with his attempt to separate law and morality.⁵ That “morally indifferent” perspective which is

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1. RICHARD A. POSNER, *SEX AND REASON* (1992).

2. *Id.* at 181.

3. Posner uses the phrase “sexual preference” rather than sexual orientation but does not seem to be suggesting that sexual partners are entirely “chosen,” since he seems to give credence to biological explanations of homosexuality. See, e.g., POSNER, *supra* note 1, at 105 n.50. Although he does not explain his decision to use the term “preference” rather than “orientation,” I believe that he uses that term to enhance his analogy to food preferences. He wants the readers to consider their choices of sexual partners to be a mere preference of little consequence, rather than a more significant statement about their lives. I use the word “preference” rather than “orientation” for a very different reason. I want to use that term because it emphasizes that we can experience a range of relationships with people of the same or opposite sex—in other words, it acknowledges the possibility of bisexuality. But my use of the word “preference” is in no way intended to minimize the significance of our choice of sexual partners. As I will argue in this essay, those choices often make a very significant statement about our individual identities.

4. Although Posner argues that this perspective would cause us to conclude that we should eliminate sodomy statutes, he also argues that this perspective would cause us to conclude that the prohibition against gays in the military, against recognition of homosexual marriages, and against permitting homosexual couples to adopt children, in some cases, should be retained. *Id.* at 309-22, 417-20. Many of these major issues have been addressed by proponents of gay rights, and they clearly disagree with Posner’s application of his basic principle. For a critique of Posner’s application of his perspective, see Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413 (1993).

5. Numerous scathing reviews of Posner’s *Sex and Reason* have been published by feminists. Yet none of them have attacked his attempt to separate law and morality. See, e.g., Katharine T. Bartlett, *Rumpelstiltskin*, 25 CONN. L. REV. 473 (1993) (book review); Ruthann Robson,

advanced by Posner,⁶ as well as by many proponents of gay rights, will be the subject of this essay. I will argue, by contrast, that we should develop a morally significant perspective on gay rights which I call an "embodied bisexual perspective." In Part I, I will develop an embodied bisexual perspective and, in Part II, I will apply that perspective to sodomy laws, marriage and adoption, and employment in the military.

I. AN EMBODIED BISEXUAL PERSPECTIVE

An embodied bisexual perspective is that version of morality which I believe can and should be intertwined with law. A religious feminist conception of embodiment, upon which I rely, contains two major principles. First, drawing from a theological tradition, it suggests that we should promote public discussions of moral issues under the premise that there is a proper relation between law and morality. Such a discourse can provide us with a more holistic dialogue, while also providing us with a more cross-racial dialogue, as the literature within the civil rights movement is filled with moral and religious metaphors. Second, the concept of embodiment suggests that we should try to avoid bipolar discussions of issues, particularly issues that affect the body. Thus, as I will argue, our highly polarized gay/straight dichotomy (with no recognition of bisexuality) is problematic. A bisexual perspective gives us a fuller way to describe human sexuality while also enhancing cross-racial dialogue since empirical literature suggests that bisexuality is a more frequent practice within the African-American community than in other communities.

A. *An Embodied Perspective*

An embodied perspective is commonly found in writings by radical feminist theologians, which have influenced my own understanding of an embodied perspective. For example, James Nelson has correctly argued that we should develop a "sexual theology" that combines a moral perspective with physical experiences of sexuality.⁷ As Beverly Harrison has noted, his work attends "to the best feminist insights."⁸

Posner's Lesbians: Neither Sexy nor Reasonable, 25 CONN. L. REV. 491 (1993) (book review); Martha A. Fineman, *The Hermeneutics of Reason: A Commentary on Sex and Reason*, 25 CONN. L. REV. 503 (1993) (book review).

6. I am not reviewing Posner's book in this essay, since it was recently reviewed in this journal. See Elizabeth Fox-Genovese, *Beyond Transgression: Toward a Free Market in Morality*, 5 YALE J.L. & HUMAN. 243 (1993).

7. JAMES B. NELSON, EMBODIMENT: AN APPROACH TO SEXUALITY AND CHRISTIAN THEOLOGY (1978).

8. *Id.* (comment on book jacket).

Nelson suggests that a "sexual theology" must recognize the following ideas: (1) the importance of human sexual relationships; (2) the existence of sexism within Christian theology; (3) the socially created aspects of sexuality; (4) the need to learn from, as well as to understand, people who express their sexuality differently from the majority; and (5) "the wholeness of embodied selves, the goodness of sexual pleasure, and the creative significance of sexual self-affirmation in an incarnational theology."⁹ In sum, Nelson argues that we "need to move beyond the traditional confines of 'sexual ethics' into sexual theology which takes seriously the human sexual experience in our time and place as an arena for God's continuing self-disclosure at the same time that it takes seriously the implications of Christian faith for our sexual lives."¹⁰ In other words, Nelson emphasizes the importance of an interaction between our morality and our physical experience of sexuality rather than a separation of these two arenas in our lives. But unlike conservatives who might say that morality should be used to limit our physical experiences of sexuality, Nelson considers sexuality to be an experience of self-affirmation that can be understood on a spiritual level—we rejoice in our sexuality rather than dismiss it as evil.

Nelson places his sexual theology in a framework that recognizes the socially created aspects of sexuality, but he does not specifically tie sexuality to other aspects of social justice. Carter Heyward makes that connection in her work, which, I believe, gives us a stronger conception of what constitutes an embodied perspective. She utilizes a morally based "social justice framework" which "beckons into solidarity . . . all women and other marginalized people."¹¹ Heyward concludes that in order to achieve social justice, women need to be able to develop "self-respect." She argues that through such a framework we can create the "basic conditions for a just and decent human world."¹² I agree with Heyward, and, as I have discussed elsewhere, would add the aspirations of love and compassion to her framework of respect.¹³ Social justice is not possible in a world in

9. *Id.* at 16. I should note that I read Nelson's use of the word "Christian" quite liberally as I am not a Christian. I was raised as a Jew and am deeply interested in Eastern philosophy. Thus, when Nelson refers to the implications of "Christian faith," I translate that to mean the implications of a deeply aspirational moral vision which may stem from many different moral and religious traditions. I discuss those traditions more fully in my book, *ABORTION & DIALOGUE: PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW* (1992).

10. NELSON, *supra* note 7, at 16.

11. Carter Heyward, *Is a Self-Respecting Christian Woman an Oxymoron: Reflections on a Feminist Spirituality for Justice*, 3 *RELIGION & INTELL. LIFE* 45, 46-47 (1986).

12. *Id.* at 49.

13. The principles of love, compassion, and respect are not unlimited principles. As I discuss in *ABORTION & DIALOGUE*, *supra* note 9, they are preconditions to dialogue but do not guarantee the result of the dialogue that might occur. Posner's work, as I will discuss, is based

which women are not socialized to respect their value as persons in our society. Unfortunately, the abusive treatment suffered by women in the sexual context (e.g., rape and battery) has made it difficult for women to attain self-respect and respect from others. It is hard to imagine a world in which men would rape women if men and women were socialized to respect women's bodily integrity.

As I will discuss below, this kind of "embodied" framework, which writers such as Nelson and Heyward base in a sexual theology, is very consistent with the writings of many women of color, irrespective of whether or not the women of color explicitly ground their work in a sexual theology. If we would ground issues such as gay rights in such a sexual theology, I believe that we might then be able to begin to overcome some of the racial divisiveness in our society and in feminism. As many of my students have taught me, we cannot expect to have a progressive politics which is inclusive of African-American, Hispanic, Asian-American, Native American, and white communities if we are not willing or able to discuss our politics in moral and religious terms.¹⁴ I will argue that the absence of a genuine holistic moral dialogue about gay rights has harmed this movement by causing its public debates largely to be debates among members of the white community. Proponents of gay rights have made little headway in creating bridges to women and men of color. This substantial problem, I believe, can be partially solved through the use of a fully embodied framework which embraces bisexuality. Thus, the concept of embodiment has the potential of offering us an additional contribution—it can help us enter into a more productive cross-racial dialogue. Nonetheless, as I will discuss, I acknowledge that the relationship between feminism and theology has often been a strained one. I simply suggest that such strains are not inevitable.

The writings of many African-American, Hispanic, Asian-American, and Native American feminists (or "womanists"¹⁵ as they sometimes

on such fundamental disrespect for the lives of gay men and lesbians that it does not meet the preconditions for dialogue.

14. Religion has a great deal of importance to many women in our society. See, e.g., Cheryl B. Preston, *Feminism and Faith: Reflections on the Mormon Heavenly Mother*, 2 TEX. J. WOMEN & L. 337, 340 n.11 (1993).

15. Alice Walker defines "womanist" as follows:

Womanist encompasses feminist as it is defined in Webster's but also means instinctively pro-woman. It is not in the dictionary at all. Nonetheless it has a strong root in Black women's culture. It comes (to me) from the word womanish, a word our mothers used to describe and attempt to inhibit strong outrageous or outspoken behavior when we were children: You're acting womanish! A labeling that failed for the most part to keep us from acting womanish whenever we could that is to say like our mothers themselves and like other women we admired.

Alice Walker, *Coming Apart*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 95, 100 n.* (Laura Lederer ed., 1980)

prefer to be called) are often filled with moral and religious imagery, and are also critical of a mainstream feminist perspective. These writings help us to learn how to discuss important issues in ways that build bridges across religious and racial lines.

Women of color have often felt barred from American feminism due to its exclusion of racial concerns. For example, African-American women were asked to forgo their interest in voting as "blacks" for the sake of the "woman's vote."¹⁶ In the "second wave" of feminism, the mainstream movement again excluded women of color through works such as Betty Friedan's *The Feminine Mystique*, published in 1963. As vividly described by bell hooks, this work was unconsciously reflective only of the lives of middle- and upper-class married white women. Friedan argued that women would be more satisfied with a career, but she ignored those "who would be called in to take care of the children and maintain the home if more women . . . were freed from their house labor and given equal access with white men to the professions."¹⁷ Not surprisingly, such literature made many African-American women, who often worked full-time in the homes of middle-class white women, feel ignored and trivialized by the women's movement.

These feelings of exclusion continued to exist in the 1970s as the women's liberation movement became a larger force in American society. For example, Paula Giddings describes one incident that was reflective of how and why many black women felt alienated from the women's liberation movement. Members of Third World Women were carrying signs at a Women's Liberation Day march in 1970 that criticized Angela Davis's mistreatment by the federal and state government because of her opposition to the Vietnam War. "[O]ne of the leaders of NOW ran up to us and said angrily, 'Angela Davis has nothing to do with the women's liberation.' 'It has nothing to do with the kind of liberation you're talking about,' retorted [a female African-American activist], 'but it has everything to do with the kind of liberation we're talking about.'"¹⁸

Although I will argue that religious feminism can be a source to draw white and black women together, it can also be a kind of feminism from which black women feel excluded. For example, in the path-breaking anthology, *This Bridge Called My Back: Writings by*

16. See PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 54-55 (1984).

17. BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 1-2 (1984). See also GIDDINGS, *supra* note 16, at 299 (providing racial critique of Friedan's work).

18. GIDDINGS, *supra* note 16, at 305.

Radical Women of Color,¹⁹ Audre Lorde wrote an open letter to Mary Daly (a white feminist and theologian), criticizing her for ignoring the contributions of "our black foremothers"²⁰ in her work and for failing to discuss any examples from African myth, legend, or religion in her discussion of the nature of female power in her book, *Gyn/Ecology*. "What you excluded from *Gyn/Ecology* dismissed my heritage and the heritage of all other non-european women, and denied the real connections that exist between all of us."²¹ Lorde observed that this kind of exclusion serves the forces of racial division in our society.²² Nonetheless, the anthology is filled with religious imagery, demonstrating the importance of religion to the feminism of many women of color.

Despite the alienation that many African-American women have felt from the mainstream women's movement, there have been many productive attempts to engage in genuine dialogue. Religion has often served as the common ground to draw white and black women together. In 1920, a Methodist minister, Will Alexander, formed the Council for Interracial Cooperation in Atlanta.²³ This religious organization provided whites and blacks with a context that emphasized their common humanity rather than their stereotypical racial differences. As one white woman observed, "Whites knew only Black servants and the criminal in the daily papers . . . but the masses of the best people of my race do not know the best of the Negro race."²⁴

Unfortunately, this cross-racial interdenominational work has not been a key feature of the "second wave" of feminism. As noted by Caroline Ramazanoglu,²⁵ recent "feminist texts often pay little attention to religion except to identify particular religions as sources of patriarchal ideology and practice."²⁶ This exclusion is problematic because

19. THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherrie Moraga & Gloria Anzaldua eds., 1981).

20. Audre Lorde, *An Open Letter to Mary Daly*, in THIS BRIDGE CALLED MY BACK, *supra* note 19, at 94, 94-97.

21. *Id.* at 95.

22. *Id.* at 96. Similarly, the importance of religion or spirituality in making women of color feel included in the women's movement is evident in an anthology of writings by North American Indian women. See generally A GATHERING OF SPIRIT: A COLLECTION BY NORTH AMERICAN INDIAN WOMEN (Beth Brant ed., 1988).

23. See GIDDINGS, *supra* note 16, at 171.

24. *Id.* at 173. Similarly, bell hooks concludes her book with a statement about the importance of theological conceptions of love, compassion, and dialogue to our lives. HOOKS, *supra* note 17, at 161.

25. CAROLINE RAMAZANOGLU, FEMINISM AND THE CONTRADICTIONS OF OPPRESSION (1989).

26. *Id.* at 151.

religion can be the dominant factor in the personal identity and cultural location of millions of women around the world. If religion is one of the most important and immediate factors which enables a woman to know who she is, and to give meaning to her life, an international feminist movement cannot afford to ignore religion.²⁷

By saying that more attention to spirituality within feminism might make women of color feel integrated into the movement, I do not mean to romanticize mainstream religion. The Black Church, for example, has itself been a tool for perpetuating sexism within the African-American community by existing within a male hierarchical structure.²⁸ Giddings provides many examples of the Black Church's exclusion of women from the nineteenth century to the 1970s. The following example ties this exclusion to the dominant role of the Black Church in the civil rights movement:

One would think that Ella Baker, by virtue of her role in the creation of SCLC [Southern Christian Leadership Conference], would have had a decision-making role. Although she says she did not seek such a position, her observations of the organization are revealing:

There never would be any role for me in a leadership capacity with SCLC. Why? First, I'm a woman. Also, I'm not a minister. And second . . . I knew that my penchant for speaking honestly . . . would not be tolerated. The combination of the basic attitude of men, and especially ministers, as to what the role of women in their church setups is—that of taking orders, not providing leadership—and the . . . ego problems involved in having to feel that here is someone who . . . had more information about a lot of things than they possessed at that time . . . This would never have lent itself to my being a leader in the movement there.²⁹

It is not, of course, only the Black Church that has perpetuated sexism. Many predominately white Christian churches have also perpetuated sexism, as well as homophobia, within American society. For example, at the insistence of the bishop, the United Methodist Church put Rose May Denman on ecclesiastical trial in 1987 for being a “self-avowed, practicing homosexual” minister in violation of the

27. *Id.*

28. Paula Giddings traces the historical routes of patriarchy within the Black Church in the nineteenth century. See GIDDINGS, *supra* note 16, at 64.

29. *Id.* at 312.

Book of Discipline, the volume of rules that governs that church.³⁰ Similarly, the Roman Catholic Church defrocked and eventually excommunicated Father Bill Dorn after a diocesan newspaper published an article that was critical of that church's stance on homosexuality.³¹ Dr. James S. Tinney, the minister of a black gay church in Washington, D.C., recalled that his former church performed an exorcism on him when they learned that he was gay. His former wife told his two daughters that he was demon-possessed and, until he was on his deathbed, he had no relationship with them.³²

Dr. Howard Brown summarizes the effect that negative Judeo-Christian attitudes have had on gay and lesbian people. He argues that it has made the individual homosexual feel

that access to God had been denied him, that all the majestic rites of church and synagogue celebrated events he could never hope to participate in, that his union with a lover would never be blessed, that there would be no priest, preacher, or rabbi to ease the pain of loss for the surviving partner.³³

By contrast, a more progressive attitude toward gay rights by organized religion can have a positive impact on society. Dr. Brown recounts that several religious denominations that have begun to take positive steps such as calling for the repeal of laws discriminating against homosexuals. In his words, "[t]heir advocacy of antidiscrimination laws undoubtedly carries more weight with legislators than do the appeals and petitions of small gay groups. . . . Meeting in a church allows a whole new set of impulses to come into play—including the impulse to serve others."³⁴

The fact that religion has been used to exacerbate the oppression of gay men, lesbians, and bisexual people does not mean that religion must be dismissed as an inherently negative dimension in their lives. Although the churches that support gay rights may be few, their support can be invaluable on many levels; as described by Dr. Brown, they can add social support while offering a needed moral dimension to the lives of gay and lesbian people. In addition, as I have argued above, a complete dismissal of religion as irrelevant to feminism may

30. NEIL MILLER, *IN SEARCH OF GAY AMERICA: WOMEN AND MEN IN A TIME OF CHANGE* 211 (1989). Although the jury was compelled to find her "guilty" under Church law, it awarded her the most lenient punishment—suspension from the Church. *Id.* at 226. The parishioners had wanted to be more lenient than the Church authorities. *Id.*

31. *Id.* at 228. Three weeks after Father Dorn was removed from his position in late October 1986, the Vatican issued a document stating that homosexual inclinations represented "an objective disorder." *Id.*

32. *Id.* at 247.

33. HOWARD BROWN, *FAMILIAR FACES, HIDDEN LIVES: THE STORY OF HOMOSEXUAL MEN IN AMERICA TODAY* 184 (1976).

34. *Id.* at 185-86.

contribute to the alienation of people of color from the movement. The challenge, then, is to find ways to incorporate progressive religious views into feminism in order to help build cross-cultural bridges, rather than to dismiss religion entirely.

Similarly, a dismissal of religion may contribute to the alienation of lesbian, gay, and bisexual people from feminism, including many African-Americans who are gay, lesbian, or bisexual. The gay church (and the gay synagogue) are thriving institutions in our society, simply because many gay, lesbian, and bisexual people feel a need to be connected to religion. Not all gay, lesbian, and bisexual people identify with feminism, although many people, including myself, believe that feminism can potentially contribute much to the lives of gay, lesbian, and bisexual people. Neil Miller's *In Search of Gay America* devotes an entire chapter to the role of religion in the lives of gay people. One of his subjects, Isaiah Poole, is an excellent example of a person for whom religion plays a dominant role. After being a member of the Unification Church, and then of a mainstream gay church, Poole became part of a black gay church, Faith Temple. He underwent baptism and developed a new and fulfilling relationship with Jesus.³⁵

Similarly, the writings of Mary Daly enabled Rose Mary Denman, an ordained minister, to find her lesbian identity.³⁶ For Denham, a person who had always accepted traditional Christian dogma, including what she understood to be its negative attitude toward homosexuality, the writings of Mary Daly were essential to Denman's becoming able to challenge that dogma. Daly's religious feminism helped her question "all the assumptions that governed her life."³⁷ But for the religious feminism of Mary Daly, Denman might not have been able to reconcile her life's lesbian and religious aspects. Even Audre Lorde, who criticizes Mary Daly for being racist, recognizes the role that Mary Daly has played in helping many women of color develop a new relationship to Christianity.³⁸ Thus, religious feminism may very well be essential to reaching members of the lesbian and gay community. A purely secular feminism may prevent us from reaching people who are searching for ways to reconcile their gay and religious selves.

The relationship between religion, feminism, and race is often strained, yet it remains a possible basis for much productive dialogue. Religion has contributed to the subordination of many people in our

35. MILLER, *supra* note 30, at 255.

36. *Id.* at 218.

37. *Id.*

38. See *supra* notes 20-22 and accompanying text.

society, but many of those same people still search for a meaningful religious basis in their lives. Continuing in that search may not simply provide us with a renewed meaning to life but may also teach us to engage in genuine dialogue across our differences of religion, gender, race, and sexual orientation. Hence, this Article tries to engage in a holistic discourse that embraces rather than avoids our spiritual selves.

B. A Bisexual Perspective

From the work of Nelson and Heyward, I draw the larger lesson that we should not only avoid bipolar frameworks in understanding the relationship between our physical and moral selves, but that, more generally, we should avoid bipolar frameworks when discussing nearly all major issues.³⁹ This is the bisexual aspect of my perspective. I have rarely found a bipolar category that I found useful, although maybe my dismissal of bipolar categories is, itself, a problematic bipolar category.

Dody Donnelly, who is a proponent of a "valid mystical feminism," draws a similar conclusion from radical feminist theology. She argues that "dualism stood always in the female path as the chief obstacle to confidence in her own experience, for both church and society had taught women (and men) a denigratory view of the body as inferior to the soul."⁴⁰ If society could move beyond this false duality, Donnelly says, women would have greater self-respect and would not labor under the notion they possess an inferior spirituality.⁴¹

Although Donnelly limits her discussion to women's sexuality, I believe that it equally applies to the sexuality of gay, lesbian, and bisexual people, who have been told by the mainstream culture that their sexuality is immoral and inconsistent with deeply held religious values. Moreover, both Donnelly and Nelson offer frameworks that validate bisexuality, which has often been denigrated by both the straight and gay communities, as it represents an outgrowth of the authors' rejection of bipolarities or dualisms. Instead of considering humanity to fit into two neat categories—gay or straight—they help us see the importance of recognizing a continuum of sexuality which embraces bisexuality.

The central insight from a bisexual perspective is that we should proceed from the assumption that middle or "bi" categories are useful descriptions of human nature. Thus, as I have argued elsewhere, a

39. I further discuss the implications of what I call a "bi" perspective in *BI: Race, Sexual Orientation, Gender, and Disability*, OHIO ST. L.J. (forthcoming 1995).

40. Dody H. Donnelly, *The Sexual Mystic: Embodied Spirituality*, in *THE FEMINIST MYSTIC* 120, 121 (Mary E. Giles ed., 1982).

41. *Id.* at 125, 140.

“bi” perspective allows us to see the multiracial backgrounds of many people whom we simplistically label as “African-American,” the many “bigendered” persons in our society who are forced to conform to the roles of “male” or “female,” and the range of disabilities that people in our society experience whom we rigidly place in the categories of “able-bodied” or “disabled.”⁴² This article deals with only one small part of that impoverished and rigid bipolar system—our bipolar sexual framework.

An embodied, holistic framework would therefore not be limited by bipolar understandings of human sexuality and would allow us to understand and respect each other across religious, gender, and racial differences. Such an understanding of human sexuality has been absent from discussions of gay rights by proponents and opponents alike. Opponents of gay rights have often tried to couch their arguments in religious views that are both deeply bipolar and disrespectful of the lives of lesbians, gay men, and bisexual people. Nevertheless, proponents of gay rights have often seemed hesitant to make theological arguments on the assumption that religion is always equated with conservative viewpoints.

A holistic understanding of sexuality could move us beyond the gay/straight dichotomy and could allow all of us to see ourselves at different points of experiencing our bisexuality. Nelson takes an important step in this direction when he writes:

The problem of patriarchal or sexist dualism may be even more basic to anti-gay feeling. This might be experienced in several related ways. One is the heterosexual’s possible anxiety about homosexual feelings within the self. While for the sake of economy I have been using “gay” and “heterosexual” in ways that might suggest two sharply distinct and mutually-exclusive groups, current research indicates that people commonly tend toward some degree of bisexuality. Most, for reasons not yet fully understood, develop a *dominant* orientation toward one side or the other.⁴³

Similarly, Marvin Ellison offers some insights about sexuality and embodiment that are useful for this discussion. Ellison explains how the dominant sexual categories of heterosexual and homosexual do not do justice to the “realities and complexities of our lives.”⁴⁴ Ellison challenges us to live comfortably with change and ambiguity rather than to rely on fixed categories of sexuality.

42. See generally Colker, *BI*, *supra* note 39.

43. NELSON, *supra* note 7, at 202.

44. Marvin M. Ellison, *Common Decency: A New Christian Sexual Ethics*, 50 CHRISTIANITY & CRISIS 352, 355 (1990).

Embracing bisexuality can, of course, be very threatening to a society that orders itself on neat bipolar concepts. What does it mean to be bisexual? The common stereotype is that one always has one male and one female sexual partner. This stereotype arises out of the assumption that gay men, lesbians, and bisexual people are purely sexual creatures—at all moments being involved with all eligible sexual partners. Society seems to have trouble imagining a celibate or monogamous gay, lesbian, or bisexual person.

Bisexuality is simply an accurate way to describe many people's actual experiences. The terms gay and straight assume a sexual exclusivity—that a person has always had only sexual partners of the same or opposite sex. As Betty Fairchild and Nancy Hayward have noted:

These terms [heterosexual and homosexual, gay and straight] are convenient simplifications for the idea that most people engage in sexual relations with only one sex. To get a clear perspective on the part homosexual behavior plays in the total range of American sexual experience, we should first take a look at *bisexuality* to evaluate its significance in the gay (and straight) world. There are certainly far more individuals with bisexual experience than there are lifelong exclusive homosexuals.⁴⁵

For women, in particular, bisexuality often seems to be an accurate description of their feelings of ordinary life experience. In a *Ms. Magazine* article from 1976, a large number of women reported “that when they fell in love it was with a person rather than a gender.”⁴⁶

My own understanding of bisexuality views the categories of heterosexual and homosexual as inventions that do a disservice to the realities of our lives, feelings, and relationships. A story may help show the uselessness of the traditional labels. A friend called me recently to talk about getting a teaching job where I teach, the University of Pittsburgh Law School. I explained a bit about how I got hired and specifically mentioned that the University had a commitment to diversity which facilitated my appointment. He then said, jokingly, “Oh, so they needed a married lesbian.” I appreciated the comment because it accurately reflected the malleability of the categories that we use so frequently, poking fun at the labels' mistaken connotations of exclusivity. The term bisexuality may therefore often be an accurate way to describe the complex ways that

45. BETTY FAIRCHILD & NANCY HAYWARD, NOW THAT YOU KNOW: WHAT EVERY PARENT SHOULD KNOW ABOUT HOMOSEXUALITY 75 (1989).

46. *Id.* at 76.

people live their lives, not conforming to the rigid bipolar categories of heterosexual and homosexual.

Gay and lesbian people have been defined by society in a disembodied way so that they have no identity beyond their sexual identity within mainstream culture—they are gay and lesbian rather than people. Bisexual people, as I stated earlier, also can be and have been defined in that way—as irresistibly sexual creatures who always have at least two partners. Within a fully embodied perspective, people would refuse to identify with the labels of straight or gay. Instead, they might say, “I am a bisexual woman who, at present, has no intimate partner . . . or, at present, has a partner who is a woman . . . or, at present, has several partners who are men . . . or whatever.” Defining one’s sexual orientation in such a nonstatic, fluid way would deeply challenge sexual dualities and the defining of gay, lesbian, and bisexual people as purely sexual.

Thus far, I have discussed the importance of moving beyond dualisms to embrace the existence of bisexuality, but I have not tied that step to a religious discourse. Other authors have made that link. In a recently published anthology, *Bi Any Other Name: Bisexual People Speak Out*,⁴⁷ the authors include a chapter entitled “Spirituality: Healing the Splits.” The authors argue that “[s]ex desperately needs to be re-envisioned [in a spiritual context] so we may reclaim our bodies from the degraded, trivialized way they and their responses have been represented.”⁴⁸ A bisexual perspective is therefore an embodied perspective in that it is part of a spiritual understanding that involves a holistic reclaiming of our selves.

The term “bisexuality” may be particularly useful in understanding the sexual lives of members of the African-American male community, although that possibility is rarely discussed or acknowledged. Although the Kinsey study⁴⁹ is often cited for statistics about sexual behavior, it is rarely noted that the study only included *white* American men who had engaged in a homosexual act at least once.⁵⁰ The statistics that do exist on the sexual behavior of African-American men are currently inconclusive, but preliminary studies suggest that African-American men may be somewhat more likely than white men to engage in both opposite-sex and same-sex sexual

47. *BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT* (Loraine Hutchins & Lani Kaahumanu eds., 1991).

48. *Id.* at 91-92.

49. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

50. John L. Peterson, *Black Men and Their Same-Sex Desires and Behaviors in GAY CULTURE IN AMERICA: ESSAYS FROM THE FIELD* 147, 148 (Gibert H. Heidt ed., 1992).

behavior.⁵¹ Nonetheless, many of these men who participate in both heterosexual and homosexual activity continue to identify themselves as heterosexual.⁵² A bisexual perspective may therefore be more racially inclusive in terms of understanding how sexual behavior actually occurs in the male African-American community.⁵³ The invisibility of African-American men who engage in sexual behavior with other men has made it difficult for health care professionals to spread effectively the "safe sex" message in the African-American community. By subscribing to a rigid assumption that people who primarily identify as heterosexual are not engaging in same-sex sexual behavior, health care professionals have not, until recently, targeted heterosexual African-American men for safe sex education. Similarly, the highly bipolar gay rights debate, with its classification of "gay" and "straight," may make many people within the African-American and Hispanic communities feel unwelcome. Brenda Marie Blasingame explains this cultural phenomena:

In talking with older people of color who are queer, I've found that they often say that in their community people had relationships with people. Some people chose to be involved with both sexes, whereas others chose to be exclusively involved with same-sex partners. They spoke of how some people were bisexual. That was not what it was called, but that was what was taking place. It was not a subject of conversation: people knew who was in a relationship with whom, that was how it was and life went on. . . .

I once talked with a Latino male doing AIDS education in the Latino community about his approach to educating the community about safe sex. He said there was no word for bisexual per se, but that bisexuality existed in the community and that this had to be addressed in order to teach safe sex. It was very much like the black community. When they talk about safe sex they have to refer to it as "when you have sex with another man." Bisexuality existed in this community.⁵⁴

51. See *id.* at 148 (reporting that black men were more likely than white males to engage in anal intercourse with another man in prison population).

52. See *id.* at 150. This failure to identify as homosexual or bisexual despite the experience of same-sex sexual relationships may be reflective of the racism within the white gay movement. See *id.* at 152. Sexual identity and racism may therefore be deeply connected. Thus, bisexuality within the African-American male community might become more evident if the larger society in which we live were no longer racist.

53. My attention has not been drawn to any discussion of sexual behavior within the female African-American community. Discussions of "women" generally do not distinguish between African-American and white women.

54. Brenda M. Blasingame, *The Roots of Biphobia: Racism and Internalized Heterosexism*, in CLOSER TO HOME: BISEXUALITY & FEMINISM 47, 51-52 (Elizabeth R. Weise ed., 1992).

Blasingame's discussion provides excellent insight into the bridges that must be crossed if people of color are to feel more welcome in the "gay" movement. Our bipolar orientation about sexuality therefore contributes to a misleading understanding of how people actually experience sexuality in their lives while also making people in various ethnic communities feel separated from the gay rights movement. When we can start talking about people who have sex with people of the same sex, without making any assumptions about whether they also have sex with people of the opposite sex, then we may enter a more racially inclusive politics.

If it is true that far more people have experienced a bisexual lifestyle than is commonly recognized, why is bisexuality usually ignored?⁵⁵ I would suggest that ignoring bisexuality allows society to perpetuate the myth that sexuality is rigidly dichotomous. That myth seems to be a male and white myth to the extent that it especially hides women's and African-American men's sexual experiences.⁵⁶ John McNeill argues that this bipolar imagery creates a "narrow, impoverished, and dehumanizing self-image for both parties."⁵⁷

Additionally, the concept of bisexuality may not be given effect because it might force us to define sexual orientation in a way that is not tied entirely to ongoing sexual experiences. A person's *feelings* rather than choice of sexual partner would be most relevant. This point arises from the fact that many people identify themselves as bisexual at times when they are currently involved with both a man and a woman. They may be involved with, for example, a man but recognize the possibility (in some cases based on their past experience) that they could, in the future, be involved with a woman. A fully embodied understanding of sexuality, of course, understands that our sexuality is far more than our current sexual experiences. Thus, I would suggest that it is a disembodied conception of sexuality that leads society to view sexuality narrowly, noncontextually, and rigidly.

55. Interestingly, homosexuality is also often invisible. Polls consistently report that few adults in the United States believe that they know any gay or lesbian people. See, e.g., Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 194. I know of no poll, however, that has even asked people if they know anyone who is *bisexual*. Poll data also shows that people who report that they know gay or lesbian people tend to be tolerant of them. See, e.g., *id.* The invisibility of bisexuality therefore probably contributes to stereotypical attitudes but, again, it is hard to prove this assertion since researchers do not appear to ask questions about bisexuals.

56. A major contributor to that myth was Sigmund Freud. Although he believed that all humans have a bisexual capacity and that even people who are heterosexual retain homosexual tendencies, he did not challenge the dichotomous categories of heterosexual and homosexual. For further discussion, see Law, *supra* note 55, at 204.

57. JOHN J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* 148 (1976).

Another important consequence of a bisexual perspective that might promote cross-racial dialogue is a rejection of separatism. Separatism requires people to identify with one aspect of themselves—woman, black, gay, handicapped, and so on. An African-American lesbian who is a separatist, for example, would have to separate herself into three distinct categories, none of which would accord sufficient respect to her humanness. In addition, as we have seen, separatism in the women's movement has often meant that this movement has operated only to strengthen the voices of middle- and upper-class white women, paying little attention to racial and class issues.

Bell hooks does an excellent job in describing the alienation that occurs within a "woman's only" feminist movement:

Anti-male sentiments alienated many poor and working class women, particularly non-white women, from the feminist movement. Their life experiences had shown them that they have more in common with men of their race and/or class group than bourgeois white women. They know the sufferings and hardships women face in their communities; they also know the sufferings and hardships men face and they have compassion for them.⁵⁸

This antiseparatist perspective is related to the role of African-American women in the church. Hooks, for example, describes the role of African-American and white women within the cultural groups in their community. African-American women, she suggests, have always played a prominent role in the church; white women have had a more submissive role within cultural organizations. Summarizing from this cultural difference, hooks says: "Without the material input of black women, as participants and leaders, many male-dominated institutions in black communities would cease to exist; this is not the case in all white communities."⁵⁹ Asking African-American women to be separatists is therefore asking them to break their important ties to the Black Church. This makes no political sense and contributes to the law/morality dichotomy that I have criticized above.⁶⁰

58. HOOKS, *supra* note 17, at 68-69.

59. *Id.* at 70.

60. Nevertheless, I do not mean to question the need for various subgroups such as African-American women or lesbians to separate momentarily, in order to establish their own sense of needs and priorities. Beverly Smith, for example, criticized separatism as a political movement but nonetheless recognized that "it has some validity in a more limited sphere." See Barbara Smith & Beverly Smith, *Across the Kitchen Table: A Sister-to-Sister Dialogue*, in THIS BRIDGE CALLED MY BACK, *supra* note 19, at 113, 121. Barbara Smith recognized that it was legitimate for a lesbian to be a separatist in order to acknowledge "that you really don't need men to define your identity, your sexuality, to make your life meaningful or simply to have a good time. That doesn't necessarily mean that you have no comprehension of the oppressions that you share with men." *Id.* For an excellent defense of the need for African-American women to

In sum, the disembodied nature of gay rights discourse remains a problem both in society as a whole and in the gay rights community. In society-at-large, the assumption exists that the only legitimate religious perspective on gay rights must be opposed to gay rights. Proponents of gay rights have ceded the moral high ground and have tried to insist that we keep morality separate from politics. A more holistic view would argue for gay rights from the perspective that gay people deserve protection from persecution as *persons*, not because we should abstractly separate law and politics. Within the gay community, a holistic perspective would also help us see across our differences—to recognize the full range of human sexuality that can be expressed. It would help us move beyond the rigid dichotomies of gay and straight to recognize the bisexuality in many of us. Moreover, such a holistic dialogue might cut across racial differences by not requiring us to identify with rigid categories that conflict with our cultural experiences.

II. FROM SEXUAL PRACTICE TO SEXUAL RELATIONSHIP: THREE APPLICATIONS OF AN EMBODIED BISEXUAL PERSPECTIVE

A. *Sodomy Laws*

In the first part of this Article, I noted that both Richard Posner and proponents of gay rights have often argued for a separation of law and morality. As I will discuss below, proponents of gay rights are correct to criticize the way religious arguments have helped to justify antigay decisions such as *Bowers v. Hardwick*,⁶¹ in which the Supreme Court upheld a sodomy statute only enforced against homosexuals. Nevertheless, they are wrong to rely on the disembodied view that religious arguments have no place in deciding issues like the constitutionality of the Georgia statute at issue in *Bowers*.

An embodied discussion of the *Bowers* decision shows us that the proponents of state sodomy statutes support their views with religious arguments; their religious arguments, however, are not the only such arguments available. Opponents of state sodomy statutes often hide behind the contention that a state cannot codify a religious point of view. By using this antireligion argument, they avoid discussing the lives of the individuals who are affected by state sodomy statutes. Their arguments are disembodied in two senses: they carefully avoid making any religious or moral arguments, and they do not discuss the

disassociate from white women, see Pamela J. Smith, *We Are Not Sisters: African-American Women and the Freedom to Associate and Disassociate*, 66 TUL. L. REV. 1467 (1992).

61. 478 U.S. 186 (1986).

wholeness of the lives of gay, lesbian, and bisexual people. Rather than relinquish the moral high ground on sodomy statutes to religious fundamentalists, I suggest that proponents of gay rights argue that they have a religious perspective that is constitutionally required to be respected, not because it is a religious argument, but because it offers a liberating respect for the lives of all people. In other words, certain kinds of religious arguments should receive constitutional protection; the question is how to identify when a religious argument is constitutionally permissible or even constitutionally required.

In *Bowers v. Hardwick*, the Supreme Court relied on a distinctly religious perspective to uphold the criminalization of homosexual activity. For example, Justice Burger, in his concurring opinion, provided support for the Court's position through reference to the fact that "condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."⁶² He summarized this history by stating that "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."⁶³

The dissent in *Bowers* does not question whether engaging in homosexual sodomy can be consistent with Judeo-Christian moral and ethical standards. Instead, the dissent argues that the religious nature of the majority's perspective demonstrates its constitutional invalidity. In the words of the dissent:

Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16-6-2 represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.⁶⁴

The dissent claimed that it was constitutionally impermissible for the state of Georgia to codify a point of view that had theological roots. The problem with the dissent's argument is that whatever position the state of Georgia takes with respect to sodomy will conflict with some religious viewpoint on sodomy. The current statute codifies a religious fundamentalist perspective (among others). Repeal of the statute would codify a more liberal religious perspective, like that held by James Nelson and others. The dissent assumes, as does the larger society, that there is only one religious perspective on

62. *Id.* at 197 (Burger, C.J., concurring).

63. *Id.*

64. *Id.* at 211-12 (Blackmun, J., dissenting).

sodomy—an antisodomy perspective. In fact, the dissent fails to acknowledge that a variety of complex religious views exist on the issue of sodomy. It is much too simplistic to say that the state should not criminalize sodomy because it should not establish a religious point of view.

Instead, I believe that the proponents of gay rights should argue that the state *may* codify what could be seen as a “religious” perspective on sodomy but not the particular religious perspective chosen by the state of Georgia. Such an argument does not seem to be cognizable under the framework proposed by the dissent. The dissent says:

The assertion that “traditional Judeo-Christian values proscribe” the conduct involved cannot provide an adequate justification for the statute. That certain, by no means all, religious groups condemn the behavior at issue gives the States no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.⁶⁵

That statement reflects the law/morality distinction at its worst. It suggests that proponents of gay rights cannot base their perspective on religious arguments. An author like James Nelson who embeds his support for gay rights in a spiritual understanding of the beauty of human sexuality would have to find a secular translation for his viewpoint. Censoring religious and moral arguments, however, makes us a less open and compassionate society. What if Martin Luther King, Jr., could not have argued for civil rights within a religious framework? What if Dr. King could not be quoted by the courts, because he represented a religious perspective? Such limitations on the legitimacy of speech would dull our senses and our humanity, as well as our liberty.

I suggest that we should not ask whether a viewpoint fits into the secular or moral-religious camp.⁶⁶ All discussions about sexuality are based in morality even when authors such as Posner pretend that they are not. Instead, we should look closely at whatever viewpoint is being offered—secular or religious—and ask whether that perspective conflicts with established constitutional principles. For example, we might ask whether that viewpoint provides sufficient respect for the lives and liberty of people in our society. It is the disrespectful aspect

65. 478 U.S. at 211 (Blackmun, J., dissenting).

66. I use the words “moral” and “religious” interchangeably because under First Amendment doctrine, the term “religious” is defined broadly enough to encompass nearly any moral perspective.

of a perspective that we should find intolerable, not its religious content.

Thus, in the context of the Georgia statute, we can show that the state's perspective is unconstitutional not because it is religious but because it conflicts with the right of equal protection under the laws. The state has unconstitutionally failed to respect the very integrity of the lives of gay, lesbian, and bisexual people. The Court has consistently avoided this line of reasoning because it has consistently avoided acknowledging that homosexuals constitute a "suspect class," deserving of heightened scrutiny in traditional equal protection analysis. The history of discrimination against gay men and lesbians, however, presents itself as much more constitutionally relevant than the historical derivation of sodomy laws. Whether those laws happen to coincide with or derive from religious arguments will not affect the quality of their impact on the lives of gay and lesbian people; it is that impact which should be the focus of our attention.

The failure to use an equal protection analysis and thereby inquire about the lives of gay and lesbian people results in their invisibility, even in cases which involve basic aspects of their lives. For example, Michael Hardwick is entirely absent from both the dissent's and the majority's disembodied discussions in *Bowers v. Hardwick*. What did it mean for Michael Hardwick to know that his lifestyle was condemned by the state of Georgia and that he was even subject to prosecution? How is the consensual act of sex itself transformed, degraded, and manipulated when it is made illegal? How is the basic self-respect of gay, lesbian, and bisexual people affected by such state statutes? The dissent's antireligion argument not only fails to persuade but avoids those difficult questions.

By contrast, the European Court of Human Rights confronted these issues when it concluded that the Northern Ireland statute which made it a "crime, punishable with a maximum sentence of life imprisonment, to commit buggery" violated the European Convention on Human Rights.⁶⁷ Unlike the Court in *Bowers*, the lawyers in *Dudgeon v. United Kingdom* demonstrated how the challenged statute had affected the plaintiff's life.⁶⁸ This strategy was successful despite the fact that, unlike Michael Hardwick, Dudgeon had not spent any time in jail due to his homosexual activity.

67. *Dudgeon v. United Kingdom*, 40 Eur. Ct. H.R. (ser. B) at 41 (1980).

68. The court stated that the petitioner "alleged that the prejudice he had personally suffered included psychological distress, fear of legal repercussions through meeting with other homosexuals, fear of harassment, blackmail, persecution and resultant disclosure and exposure." 40 Eur. Ct. H.R. (ser. B) at 48.

As antiscegenation statutes harmed the self-respect of African-Americans, antisodomy statutes harm the self-respect of gay men, lesbians, and bisexual people. The idea of human experience, however, is absent from our constitutional discourse. In *Loving v. Virginia*,⁶⁹ the antiscegenation case, the Court used an equal protection argument to explain why the state's statute (which was historically justified in religious terms) was unconstitutional. It adopted an equal protection framework because it understood that antiscegenation statutes were rooted in a white supremacist perspective. These laws degraded the lives of all African-Americans, regardless of whether an individual African-American cared to marry a white person. Similarly, sodomy statutes can abstractly be applied against all members of our society but, as the Court found in *Bowers*, they are usually only enforced against people engaging in same-sex sexual behavior (whom the court categorized as homosexuals). It is the antihomosexual animus lying behind the application of these statutes that makes them problematic, not their religious roots.

In his separate opinion in *Dudgeon*, Justice Polak drew the explicit connection between sodomy laws and antihomosexual animus using equal protection principles. He stated that, by "maintaining these provisions, the State discriminates strongly against this group of the population in comparison with heterosexual adults who are free to have any kind of sexual contact in private. This difference amounts to a clear inequality of treatment in the enjoyment of the right in question."⁷⁰

Dudgeon's highly personal account of his treatment under the law allowed the majority of the Court of Human Rights to see the way this statute undermined his right to flourish as a human in our society. Although this conclusion can be drawn under privacy doctrine, as it was by a majority of the European Court, it can also be drawn under an equality-based doctrine, as exemplified by Justice Polak's concurring opinion.

The equality problems with the Georgia sodomy statute, however, do not limit themselves to an understanding of the statute's antihomosexual bias. The statute in *Bowers* should also be considered unconstitutional because of the ways in which it uses gender classifications in contravention of the Equal Protection Clause. A bisexual perspective can help us understand this problem. Michael Hardwick was arrested for engaging in oral sex with another man. If his partner had been a woman, he could have engaged in the same sexual act, but

69. 388 U.S. 1 (1967).

70. 40 Eur. Ct. H.R. (ser. B) at 61-62 (Polak, J., concurring).

would not have been subject to prosecution. Thus, it was a highly polarized understanding of both gender and sexual orientation that drove the state statute. It was only because Hardwick's partner was not of the "opposite" sex that he was subject to prosecution. A bisexual perspective would refuse to place significance on the gender of our partners; instead, it would see us as having sex with people rather than with stereotyped genders. An Equal Protection Clause that was truly based in the ideal of equality would protect us in all of our sexual choices.

Similarly, we may also view the Georgia sodomy statute as part of a societal message that reinforces gender roles. Although the Georgia sodomy statute was written in gender-neutral terms,⁷¹ it was interpreted to apply only to *homosexual* sodomy. It was therefore a part of the larger societal scheme that seeks to coerce individuals to engage in exclusively heterosexual relations, which should ideally be confined to the institution of marriage. Gay and lesbian people are therefore denied the opportunity to engage in meaningful sexual expression. As I will discuss later, rules about sexual activity combined with rules about who may enter marriage help reinforce a gendered and patriarchal institution of marriage in our society.⁷²

Thus, the Georgia sodomy statute is unconstitutional because it fails to respect gay men, lesbians, and bisexual people in an intimate and expressive aspect of their lives. Moreover, it is wrong because it relies on an obsessive preoccupation with the gender of our sexual partners. An embodied bisexual perspective that is rooted in the moral value of respect for others helps to expose the unconstitutionality of the Georgia statute. Morality and law must be intertwined to protect our most basic human freedoms.

B. Marriage and Adoption

In the context of marriage and adoption, Posner abandons his search for a morally indifferent perspective, believing that law should retain some restrictions on marriage and adoption for gay and lesbian people, in order to further certain moral values. Some proponents of gay rights, in contrast, argue for a separation of law and morality in dealing with these issues. As I will discuss below, Posner's moral perspective is not the only one available. An embodied bisexual perspective could create powerful arguments for recognizing the right

71. The Georgia statute prohibited anal and oral sex. GA. CODE ANN. § 16-6-2 (1984).

72. For further discussion of the connection between gender, sexual orientation, and the patriarchal institution of marriage, see Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991).

of gay and lesbian people to attain societal benefits in the area of marriage and adoption.

Although Posner is willing to separate law and morality in overturning sodomy statutes, he is not willing to take that step with respect to homosexual marriage. He offers three distinctions between sodomy and marriage which, in his view, support the ban on homosexual marriage. Posner argues that: (1) permitting homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality; (2) broadening the definition of marriage reduces the information that marriage-related terms convey; and (3) authorizing homosexual marriage would have many collateral effects because marriage is a status rich in entitlements.⁷³ Posner's three arguments are connected to each other, because the externalities noted by the third argument lead him to conclude in the first argument that the law should not be morally indifferent to recognizing homosexual relationships through marriage. Because Posner considers the costs of recognizing homosexual marriage to be too great, he suggests an intermediate solution in which the state would allow gay couples to register their partnership, thereby providing them with some of the financial benefits (and responsibilities) of marriage.⁷⁴

The two key differences between Posner's proposed intermediate solution and a solution that recognizes homosexual marriage are that: (1) the intermediate solution does not purport to take a moral position on gay marriage; and (2) the intermediate solution offers gay couples fewer family-related benefits and less recognition than the current law offers to married heterosexuals. For example, Posner notes, but does not criticize, the Danish law of registered partnership, which places registered partners under all the provisions of the marriage code except those relating to children.⁷⁵ He also notes with approval that the Swedish system of registration "assumes, realistically, I think, that a homosexual relationship, even when meant to last, is more like heterosexual cohabitation than like heterosexual marriage."⁷⁶

Posner's proposed intermediate solution gives us insight into the disembodied nature of his reasoning. He refuses to acknowledge the importance of the state recognizing homosexual relationships in a way that would contribute to their legitimacy and consequently their flourishing on the broadest possible level. Instead, he constructs a solution under the premises that children are not and should not be

73. POSNER, *supra* note 1, at 312-13.

74. *Id.* at 313-14.

75. *Id.* at 313.

76. *Id.* at 314.

a major aspect of a homosexual relationship, and that homosexual relationships are inherently unstable and lack long-term commitment. He then ascribes a moral position to the state which would reinforce those premises rather than undermine them. His proposal therefore combines law and morality in a way that deeply disrespects the search for commitment within gay, lesbian, and bisexual relationships.

Posner's moral perspective on gay marriage is exactly the kind of position that causes proponents of gay marriage to argue that law and morality should be separated in determining whether or not gay men and lesbians have the right to marry. Proponents of gay rights, such as Nan Hunter, often argue that marriage should be transformed from a religious institution into a purely secular institution.⁷⁷ Hunter's entirely secular discussion of the importance of marriage misses its emotional and spiritual elements. She discusses the increased recognition of gay and lesbian families by the law for functional purposes such as rent control. She urges the courts to continue in this functional direction while also giving gay and lesbian people the option of embracing the institution of marriage.⁷⁸ However, the gains that she cites for gay and lesbian people under marriage seem to be largely economic. Her argument is in many ways consistent with Posner's argument for an intermediate solution—they are both seeking ways to extend greater economic benefits to gay and lesbian people without requiring the state to take the moral perspective that their relationships deserve the label of marriage.

An embodied bisexual perspective, however, could provide us with a way of discussing gay marriage that would not be dependent on the separation of law and morality, a way that, unlike Posner's, respects the fundamental dignity of gay, lesbian, and bisexual couples. For example, Dwight Penas has attempted to discuss why gay and lesbian people should be permitted to participate fully in the institution of marriage by using Puritan religious ideology.⁷⁹ In order to understand why prohibiting gay and lesbian marriage is inappropriate, he argues that one must recognize the full implications of the covenant of marriage. Penas's theologically based argument for the recognition of gay and lesbian marriage goes far beyond the economic benefits flowing from marriage. He argues that "the denial of legal recognition for same-sex marriages takes a toll beyond the economic and legal costs."⁸⁰ We must recognize the "intertwined legal and

77. See, e.g., Hunter, *supra* note 72, at 13.

78. See *id.* at 19-27.

79. Dwight J. Penas, *Bless the Tie That Binds: A Puritan-Covenant Case for Same-Sex Marriage*, 8 LAW & INEQ. J. 533 (1990).

80. *Id.* at 550.

emotional burdens that [partners] must bear as a result of the lack of legal sanction for their relationship.”⁸¹ Penas urges that we apply “covenant theory” to affirm the importance of personal relationships. “The fundamental premise of covenant theory is that human life is communal, interpersonal, social.”⁸²

A covenantal perspective would suggest that it is not enough for society to accept, one step at a time, the right of gay and lesbian couples to share in the benefits of a rent-controlled apartment,⁸³ obtain alimony after a separation,⁸⁴ or to receive certain governmental benefits under ordinances passed at the local level. These marginal economic benefits may fool society into thinking that it has granted gay and lesbian people all the “rights” they need while failing to recognize the spiritual, emotional, and covenantal aspects of their relationship, which are often best described by the term “marriage.” Penas argues that this covenantal aspect of marriage can best be located within an equality-based legal tradition.⁸⁵ Thus, gay and lesbian couples will never have the full respect of society unless they can partake in the symbolic, as well as the functional, aspects of marriage. The functional benefits are certainly important, but they are not sufficient to accord gay and lesbian people the social support and validation of the emotional bond of marriage.

The marriage issue is deeply intertwined with the question of adoption, which Posner explores and concludes should not be modified to benefit homosexual parents. The adoption issue receives implicit recognition by Posner during his marriage discussion when he notes that Denmark did not extend to registered gay couples the right to children that it provides to heterosexual partners. But Posner does not even consider that exclusion worthy of discussion, although later in his book he does explain that gay and lesbian couples should not be granted the right to adopt children on the same basis as heterosexual couples.⁸⁶

Posner agrees with court decisions that have limited the custody or adoption rights of gay men or lesbians where those individuals wanted to “flaunt” their sexual orientation by openly making their children

81. *Id.*

82. *Id.* at 554 (quoting DOUGLAS STURM, COMMUNITY AND ALIENATION: ESSAYS ON PROCESS THOUGHT AND PUBLIC LIFE 61 (1988)).

83. See *Brisk v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) (treating gay couple as family for purposes of provision in New York rent control law that protected surviving “members of the family” from eviction in event of death of named tenant).

84. See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (recognizing implied contract for support of unmarried partner).

85. Penas, *supra* note 79, at 561.

86. See POSNER, *supra* note 1, at 419.

a part of their lifestyle.⁸⁷ He criticizes a father who wanted to take his eleven-year-old son to homosexual social gatherings and to a gay church, and criticizes both that father and a lesbian for wanting to teach their children that a gay or lesbian lifestyle was desirable.⁸⁸ Interestingly, Posner contends that gays and lesbians are not as happy as heterosexuals,⁸⁹ but then criticizes gays and lesbians when they want to communicate their contentment with their lifestyles to their children.

Posner's discussion of custody and adoption for gay couples contains two major flaws. First, his argument uses as its premise the moral perspective that gay parents should communicate a message of inadequacy rather than equality to their children. Second, his argument is entirely devoid of any understanding of the importance of children to the general flourishing of relationships, including those of gay and lesbian couples. Not surprisingly, he therefore does not explore the effect of current adoption laws on the lives of gay and lesbian couples. His argument is therefore disembodied: he adopts a moral perspective that is deeply disrespectful of the lives and liberties of gay men and lesbians, and that is not based on an understanding of the full lives of gay men and lesbians.

Posner has done the empirical research that would allow him to appreciate the significance that being able to adopt children might have for homosexual couples. For example, Posner says that "[c]hildren are the strongest cement of marriage and the emotional, if no longer the financial support, of old age."⁹⁰ And because homosexual couples cannot have children who are biologically their own, and must adopt or have a child from one of the couple's gene pools, he concludes that homosexual relationships are inherently less stable.⁹¹ Noting that people in the "average homosexual marriage would have fewer children than the average heterosexual marriage,"⁹² he concludes that homosexual marriages are less stable than heterosexual ones.

Despite Posner's propensity for empirical research, he does not offer any evidence for his claim that the more children a couple has, the less likely they are to get divorced. It certainly would not be surprising to learn that couples with large numbers of children

87. *Id.*

88. *Id.*

89. For example, Posner says: "I conclude that even in a tolerant society the life prospects of a homosexual—not in every case, but on average—are, especially for the male homosexual, grimmer than those of an otherwise identical heterosexual" *Id.* at 307.

90. *Id.* at 305-06.

91. *Id.* at 304.

92. *Id.* at 305.

experience more marital strain than couples with only few or no children. But aside from the subjectivity of his correlation between the number of children and the strength of a marriage, Posner's conclusions are very troubling because of the way he glibly assumes that couples would feel less committed to children who are adopted or who are only a product of one of their gene pools. Adoption, artificial insemination, surrogacy, and custody are all methods that may be used by gay and lesbian couples to become (or to stay) parents. Each of those methods involve strong intentionality; gay and lesbian couples, in particular, do not become parents through adoption without going to great lengths to find a child. Posner's inability to comprehend how such steps might be meaningful to gay couples and might reflect an extremely committed relationship shows the limited understanding he has of the nature of these relationships. Children are not just the "cement" that makes it cumbersome to end a married relationship; they can become the essential meaning of one's life as a parent and as a part of a couple. Children, however, only seem to serve functional purposes in Posner's analysis—holding marriages together or providing support in old age—rather than serving emotional, social, and spiritual purposes. Those purposes can be, and are, readily fulfilled even if a child is not the product of the biological union of a couple.

Posner's analysis of the relationship between children and stable relationships is also flawed by his apparent assumption that children born to heterosexual couples are always *wanted and intended*. Unplanned pregnancies have been identified as a major factor in studies of divorce rates.⁹³ Although the birth of children who are intended and wanted may strengthen a marriage, the birth of children who are unintended may of course hurt a marriage. One advantage, therefore, of gay and lesbian relationships is that the likelihood of unintended pregnancies is remote.⁹⁴ Thus, children do not necessarily need to be "cement." Their effect on a relationship depends, in large part, on whether they were intended and wanted. Posner's simplistic understanding of the role that children play in relationships may be convenient to his argument but has little connection to reality.

As with the issue of marriage, Posner tries to find a middle ground that would allow gay men or lesbians to adopt children in special circumstances. After noting the widespread and unscientific intuition

93. See, e.g., MARILYN LITTLE, FAMILY BREAKUP 36 (1982) (reporting that 44 percent of children born to families who divorced were unplanned).

94. As one author has noted, lesbians often make conscious choices to become parents. "It is often a carefully orchestrated undertaking, with focussed attention to the personal, social, psychological, ethical and practical considerations." Cheri A. Pies, *Lesbians and the Choice to Parent*, 14 MARRIAGE & FAM. REV. 137, 139 (1990).

that gay men and lesbians are not fit parents, he says that "it is undesirable to have a flat rule against permitting homosexuals to have custody of children or even to adopt them."⁹⁵ For example, he acknowledges that a gay man or a lesbian might be a suitable parent if he or she is the biological parent and the other biological parent is not a fit parent, or when a child has repeatedly been in foster care arrangements and the gay man or lesbian might offer a stable family life.⁹⁶ In other words, he is willing to allow gay men or lesbians to be legal parents when a child is in a particularly difficult or troubled situation, but is not necessarily willing to let gay men and lesbians compete with heterosexuals for "normal" children who are available for adoption. This view insults gay men and lesbians, as well as children in difficult situations. If gay men and lesbians can be fit parents under the most trying situations, then they can be fit parents in other contexts as well. Current laws that allow gay men and lesbians to adopt "hard-to-adopt" children take advantage of the strong desire of, and limited opportunities for, gay men and lesbians to adopt children. Posner's view also insults hard-to-adopt children who deserve society's first-priority concern. To cast them off to a group that society does not generally consider to be fit parents seems counterintuitive. We should be able to tell a child that we have tried to give him or her the best possible parents, not that we have given him or her parents who were considered too inadequate to parent other children. If Posner truly considered the intentionality and commitment of gay men and lesbians to childrearing when they do seek to obtain children, I believe he would see a commitment to children that deserves the full embrace of our society and its legal system.

In sum, Posner's limited understanding of marriage and adoption does not allow him to see the ways in which society could contribute to the flourishing of the relationships of gay and lesbian people while also contributing to the well-being of children. A fully embodied perspective on marriage would see the emotional, spiritual, and psychological aspects of gay and lesbian relationships rather than simply the functional ones. Our spouses would then be more than "partners," and our children would be more than "cement."

C. *Gays in the Military*

The final area that I feel merits discussion involves gays, lesbians, and bisexuals in the United States military. The courts, as well as

95. POSNER, *supra* note 1, at 418.

96. *Id.* at 419.

Posner, have historically used a moral perspective to uphold the exclusion of gays from the military. As with marriage and adoption, this moral perspective is based on a disembodied rather than embodied understanding of sexuality.

Posner believes that the exclusion of gays from the military can be upheld by reference to the argument that "the morale of heterosexuals, and hence the effectiveness of the military services, would suffer if homosexuals were allowed to serve."⁹⁷ He further justifies this conclusion by noting that about 70 percent of Americans believe that homosexuality is dirty, deviant, or abnormal.⁹⁸ Because of the external effect of a loss in morale among heterosexual troops, he allows a moral perspective to dictate our legal perspective. As with the issues discussed above, however, he does search for a middle ground, suggesting that we adopt Canada's approach and, without relaxing the bar against recruitment of homosexuals, permit them to remain once accepted into military service, provided they do not engage in the sorts of misconduct that would get them discharged if they were heterosexuals.⁹⁹ In other words, if homosexuals are willing to hide their sexual orientation, they may be able to stay in the military. This approach is similar to the "don't ask, don't tell" policy proposed by the Clinton Administration.

Posner's middle ground might work if being "out" as a gay person in the military were only a linguistic matter once service began. Gay men, lesbians, and bisexuals, however, do not seek to be "out" in the military just because they want to feel free to talk about their personal lives. They want to be "out" so that they can integrate their personal lives into their military lives by having the same privileges as married heterosexuals to call home, to have their families live on-base, and to receive certain family allowances. As General Schwarzkopf frequently noted in his autobiography,¹⁰⁰ family support services are very important to people who work in the military. Gay men and lesbians also have families who need those support services. Current military policies, as well as Posner's proposed middle ground, are unlikely to recognize gay men and lesbians in the totality of their lives.

The impoverished and disembodied understanding of sexual orientation that undergirds the military's policy against gays in the military can be best seen with the Clinton policy. Gays are allowed to be in the military so long as their sexual orientation only concerns

97. *Id.* at 316.

98. *Id.* at 318.

99. *Id.* at 321.

100. H. NORMAN SCHWARZKOPF, *IT DOESN'T TAKE A HERO* 262 (1992).

private, sexual acts, but does not concern public statements about love and commitment. A soldier stationed overseas cannot ask for privileges to call "home" if he or she is unmarried, but he or she can engage in private sexual behavior off-base with a person who is unlikely to be a lifetime partner. In other words, under the new policy, only the nonrelational aspects of sexual orientation are protected; the relational aspects may not be sustained through the normal public channels—communication or even publicly displayed photographs—because these steps would be too blatant. The strain of separation from family is not acknowledged as part of the lives of gay and lesbian people in the military. Only a sexuality of economics, rather than a sexuality of spiritual morality, would arrive at such a result.

The case law with respect to the exclusion of gays from the military also has a very limited understanding of what it means to be "out" as a gay man or lesbian in the military. Much of the case law seems to assume that being gay is only about sex. For example, in *ben-shalom v. Marsh*,¹⁰¹ the Seventh Circuit Court of Appeals affirmed the discharge of a lesbian from the military despite the fact that there was no evidence in the record of her ever having engaged in any lesbian sexual activity. The court justified her discharge apparently by assuming that lesbians are always engaged in sexual activity.¹⁰²

In other words, the court defined the meaning of *ben-shalom's* sexual orientation as a statement about whom she planned to have sex with tomorrow. This represents a narrow, impoverished understanding of sexuality because it starts from the rigid assumption that our sexual orientation concerns only sex. I would hope that our sexual orientation is a statement about whom we love and with whom we feel strong emotional bonds, not simply about our sexual partners. It is only when we develop a holistic understanding of the statement "I am a lesbian" that we can begin to develop military policy based on respect for the lives of gay, lesbian, and bisexual people.

CONCLUSION

In this Article, I have attempted to discuss a highly divisive issue—discrimination on the basis of sexual preference—within an embodied bisexual perspective. I have tried to show that, if we paid more attention to the religiously based writings of women of color, we would be able to develop a more holistic understanding of this issue that would be embedded in a social justice framework. That

101. 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

102. POSNER, *supra* note 1, at 464.

framework would allow us to move across religious, gender, and racial differences as we discuss sexual preference in a moral framework based on respect for others. It would give us a way to explain that our choice of sexual partners has and should have more moral significance than our choice of chocolate over vanilla.

I have tried to show that there is no morally indifferent perspective on sexual preference. A morality of economics may make our society more efficient, but it does not justify a social structure of hatred, antagonism, and disrespect toward the lives of gay, lesbian, and bisexual people. The problem with an ostensibly morally indifferent framework is its inherent morality. And the flaw in Posner's occasional "morally informed" perspective is its immoral lack of respect for the dignity of individual lives. By unmasking that morality and exposing that lack of respect, I have tried to suggest an alternative morality that would contribute to our flourishing as sexual beings in our society.

